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May 25, 2007

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**BY HAND**

Jeff S. Jordan, Esquire  
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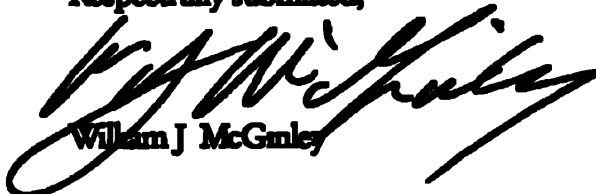
Re MUR 5910  
Americans for Job Security

Dear Mr. Jordan:

Enclosed please find the response of our client, Americans for Job Security, to the Complaint filed in the above-captioned matter. The documents in support of the response are numbered AJS000001 - AJS000998. In addition, the response includes documents attached to the response as Attachment A.

Please do not hesitate to contact me if you have any further questions in this matter.

Respectfully submitted,

  
William J. McGinley

Enclosures

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BEFORE THE FEDERAL ELECTION COMMISSION

In The Matter Of

Americans for Job Security

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MUR 5910

RESPONSE OF AMERICANS FOR JOB SECURITY  
TO THE COMPLAINT FILED BY PUBLIC CITIZEN, INC.

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I. INTRODUCTION.

This responds to the notification by the Federal Election Commission ("Commission") of a complaint filed against our client, Americans for Job Security ("AJS" or "Respondent"), by Public Citizen, Inc. ("Public Citizen") in the above referenced matter.<sup>1</sup> For the reasons set forth below, the complaint is without merit and the Commission should find no reason to believe that AJS violated the Federal Election Campaign Act of 1971, as amended (the "Act"), or Commission regulations, dismiss the matter, and take no further action.<sup>2</sup>

Initially, we are confused by Public Citizen's Complaint in this matter since it directly contradicts their comments filed with the Commission regarding the 2004 political committee status rulemaking. Specifically, Public Citizen asserted broad immunity for 501(c) groups engaged in issue advocacy.

The statutory limits on the FEC's ability to regulate non-express-advocacy by organizations other than political committees – limits that . . . remain in tact after BCRA and McConnell – continue to serve important interests in keeping campaign finance law within proper bounds. This is particularly true where ideological and educational non-profit organizations that qualify for tax exemption under IRC 501(c)(3) and 501(c)(4)-(6) are concerned. Discussion of issues of public concern, which may carry with it criticism or praise of elected officials who are candidates for federal office, is central to the mission of such organizations, and is entitled to substantial constitutional protection. Defining all communications that "attack,"

<sup>1</sup> Public Citizen's complaint is actually comprised of two components and will be referred to collectively as "the Complaint." In some instances, however, we will refer to the individual components. The first is the four page cover letter that constitutes the Commission complaint against AJS that will hereinafter be referred to as "PCFEC." The second component is a complaint Public Citizen allegedly filed with the IRS that contains the factual allegations that will hereinafter be referred to as "PCIRS."

<sup>2</sup> The Respondent's brief, exhibits and attachments filed in response to the Casey campaign complaint in MUR 5694 are hereby incorporated by reference.

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"oppose," "promote," or "support" candidates as "expenditures" under FECA would sweep within the scope of FECA regulation almost everything done by organizations devoted to discussion of, or advocacy of positions on, issues of public importance. The implications of such an expansion of FEC coverage would be huge.

PC Comment at 6-7. We could not agree more. Public Citizen also stated.

In this respect, it is essential that the definitions not go so far as to bring an entity within the definition of a "political committee" simply because it engages in activities that are advocacy in nature. In particular, a legitimate 501(c) organization should not have to fear that it will become a political committee simply by engaging in political issue-related criticisms of public officials. This imperative follows from Buckley's holding that an organization may not be treated as a "political committee" simply because it engages in "issue discussion and advocacy of political result." 424 U.S. at 79. If, however, the "major purpose" standard is circumvented by permitting it to be satisfied whenever an organization spends a certain amount of money (whether \$50,000 or any other arbitrary amount) on communications that "attack" or "support" a candidate, precisely what the Buckley Court feared will have come to pass. An organization may become subject to regulation as a "political committee" simply by engaging in political-issue related criticisms of public officials, and communications that would not otherwise have qualified as covered expenditures will become covered by a process of bootstrapping.

Id. at 10. Once again, we agree with Public Citizen's comments on the proposed political committee status rulemaking. Nonprofit IRC 501(c) organizations such as AJS should not be subjected to harassment complaints simply because they engage in issue-advocacy communications to advance their public policy agenda.

AJS specifically and generally denies each allegation made in the Complaint. The Office of the General Counsel ("OGC") must apply a fair and objective review of AJS's communications, applying the legal standards established by the federal courts and Commission regulations and precedents in effect at the time the communications were distributed. If applied, this process will result in findings that:

- No AJS communication satisfies the express advocacy standard under either 11 CFR §§ 100.22(a) or 100.22(b). Therefore, AJS did not fail to report any expenditures as alleged in the Complaint.
- The Complaint does not allege that AJS received any contributions as a result of communications with members or potential members under FEC v. Survival Education Fund, Inc. or 11 C.F.R. § 100.57. Since AJS's communications do not constitute express

advocacy as discussed above, no AJS request for funds from its members or potential members indicated that any portion of the funds would be used to support or oppose a federal candidate. Therefore, AJS did not fail to report any contributions as alleged in the Complaint

- AJS's major purpose, consistent with its IRC 501(c)(6) tax status, is focused on educating the public on policy positions and encouraging the public to urge legislators – or other government officials or public figures – to support policies consistent with AJS's pro-job, pro-growth agenda. Such educational efforts and other "grassroots lobbying" are standard fare for trade associations such as AJS. Therefore, there is no factual or legal basis for allegation that AJS's major purpose is federal campaign activity as alleged in the Complaint

Accordingly, AJS did not fail to report as a political committee with the Commission, fail to report contributions and expenditures as a political committee, knowingly accept contributions in excess of the \$5,000 contribution limit, or knowingly accept corporate contributions as a political committee as alleged in the Complaint. As explained fully below, AJS does not satisfy the definition of "political committee" so that this matter should be dismissed, and the Commission vote to take no further action.

## II. STATEMENT OF THE FACTS.

The allegations contained in the Complaint are factually inaccurate. For example, the Complaint states that the "sole common denominators of AJS's messages appear to be diminishing the electoral prospects of Democratic candidates for office or aiding the prospects of Republican candidates." PCIRS at 2. However, AJS is concerned about issues, not candidates. For example, the complaint ignores the issue advocacy communications sponsored by AJS on the death tax and asbestos trust fund issues that took Republican lawmakers to task for their policy positions on the legislation.

In addition, the Complaint states that "[n]one of the ads ever identified specific legislation and none of the ads aired when pertinent public policies were being considered in Congress or by the executive branch." PCFEC at 3. However, the attachments to this response demonstrate that each AJS communication did identify specific governmental or legislative issues then before the

appropriate governmental branch or agency or that pertained to the individual referenced in the communication.

Moreover, each AJS communication listed in the Complaint contains a clear non-electoral call to action that urges the recipient or viewer to contact the referenced public figure to communicate his or her views on the issues discussed in the advertisement. No AJS advertisement identifies a public figure as a candidate, refers to an election, urges anyone to take any electoral action, or asks anyone to contribute to a campaign. Therefore, the AJS communications do not constitute express advocacy even under the expanded, and previously held unconstitutional, definition of express advocacy under 11 C.F.R. § 100.22(b).

Importantly, the complaint seeks to retroactively apply the Bipartisan Campaign Reform Act of 2002 ("BCRA") and the Commission's recent political committee status enforcement matter Conciliation Agreements to AJS's communications and activities long before the Commission's implementation of its new political committee theories or the MURs releases. This raises serious due process concerns since AJS, like the regulated community, did not have clear notice concerning the Commission's retroactive application of the 2004 political committee status rule and its pursuit of express advocacy findings under 11 C.F.R. § 100.22(b). Buckley v. Valeo, 424 U.S. 1, 77 (1976) ("Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. Where First Amendment rights are involved, an even greater degree of specificity is required.") (citations and quotations omitted). Specifically,

- Seventeen of the communications cited in the complaint were distributed before the Bipartisan Campaign Reform Act of 2002's ("BCRA") effective date and the Supreme Court's decision in McConnell v. FEC. None of these communications are subject to the electioneering communications ban on corporate funds under BCRA. In fact, no AJS radio or television communication violates the corporate funds ban on such communications that

are aired 30 days or less before a primary election or 60 days or less before a general election. Importantly, the Complaint does not allege that any AJS television or radio communication violates the electioneering communication ban on the use of corporate funds to pay for such communications.

- Only five communications were distributed after the Commission's political committee status rule regarding the definition of "contribution" became effective on January 1, 2005
- All of the AJS communications listed in the complaint were distributed prior to the Commission's announcements that respondents had signed Conciliation Agreements in the 527 political committee status enforcement actions from the 2004 election cycle (December 2006), and the Commission's supplemental explanation of its political committee status rulemaking (February 2007). The supplemental explanation was filed by the Commission in an attempt to explain how its lack of guidance on the political committee status issue did not foreclose enforcement on a case by case basis. See *Shays v. FEC*, 424 F. Supp. 2d 100, 116 (D.D.C. 2006) ("*Shays II*") ("Nor did the Commission discuss whether adjudication of individual cases that are resolved on particular facts and legal theories would be effective as a means to provide guidance to 527 groups generally").

The due process concerns are heightened in the present case since AJS is a nonprofit IRC 501(c)(6) organization that seeks to drive its public policy messages through communications to the general public that urge the recipients, listeners or viewers to contact the referenced government officials or public figures. See *Buckley*, 424 U.S. at 41 n. 48 ("[V]ague laws may not only trap the innocent by not providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.") (citations and quotations omitted), *Shays II*, 424 F. Supp. 2d at 115 ("The Court is troubled, however, by FEC's lack of explanation for its conclusion that adjudication is preferable to rulemaking for regulating 527 groups. . . The E & J does not, for instance, discuss whether First Amendment or due process concerns might impair its ability to bring enforcement actions against 527 groups in the absence of a regulation providing clear guidance as to when those groups must

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register as a political committee. In fact, FECA provides a defense to 'any person' who relies in 'good faith' on FEC rules ") (citations omitted)

Finally, the Commission must not retroactively apply any of these rules. See Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) ([A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless the power is conveyed by Congress in express terms . . . . [t]he APA requires that legislative rules be given future effect only."). Therefore, each AJS communication must be analyzed by the Commission using the rules in existence at the time<sup>3</sup>

A. Americans for Job Security.

AJS is an incorporated nonprofit trade association organized pursuant to 26 U.S.C. § 501(c)(6)<sup>4</sup> with the mission of enhancing the climate for American businesses. Affidavit of Michael D. Dubke (MUR 5694), ¶¶ 4, 6, attached hereto as Exhibit 1 (AJS 000001-000063) ("Dubke Aff.") Copies of AJS's Articles of Incorporation and the IRS determination letter are attached to Mr. Dubke's Affidavit as Attachments 1 and 4. Chief among the goals of AJS is educating the public on issues of importance to businesses and encouraging a strong job-creating economy that promotes a pro-growth agenda. (Dubke Aff. ¶ 7, Attach. 1)

<sup>3</sup> The statute of limitations has run with respect to eight communications listed in the Complaint that were distributed in calendar year 2000, and by the end of calendar year 2007, the statute of limitations will have run on an additional nine communications that were distributed in calendar year 2002. See 28 USC § 2462. Accordingly, since the statute of limitations has already run on the eight calendar year 2000 communications, this response will not address them. Rather, it will discuss the remaining 24 communications listed in the Complaint that were distributed in calendar year 2002 or thereafter.

Finally, please note that communication numbers 26 and 27 listed in the complaint discuss only state issues and officeholders. Therefore, such communications are not subject to Commission regulation since they do not reference a federal candidate.

<sup>4</sup> 26 U.S.C. § 501(c)(6) accords tax-exempt status to "[b]usiness leagues . . . not organized for profit." In order to qualify under § 501(c)(6), an organization must be "an association of persons having some common business interest, the purpose of which is to promote such common interest." 26 C.F.R. § 1.501(c)(6)-1.

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To this end, AJS has relied since its inception on broadcast and print advertising and mass mail to inform the public about issues and legislation important to the association and to urge the public to contact their legislators to support legislation favorable to American businesses (Dubke Aff. ¶ 7.) For example, in 2004, AJS produced a series of print advertisements critical of Republican Senator Don Nickles' stand on a tax issue because he did not do more to repeal the estate tax (Dubke Aff. ¶ 8, Attach. 5) The advertisements encouraged the public to contact Senator Nickles and urge him to solidify his legacy and "kill the Death Tax"

In 2005, AJS continued its campaign to raise awareness about the death tax. AJS produced a series of broadcast and print advocacy pieces that criticized Senate leadership on the basis of issue positions – namely then-Majority Leader Bill Frist, Senator Jon Kyl (who had been selected by the White House to shepherd the legislation), and then-Senator Santorum – for failing to bring legislation that would repeal the estate tax to the Senate floor for a vote, despite their public promises to repeal the estate tax. (Dubke Aff. ¶¶ 9-10, 12, Attachs. 6-7, 13) AJS also aired radio advertisements in states represented by key Democratic Senators, including Arkansas (Mark Pryor), Indiana (Evan Bayh), Louisiana (Mary Landrieu), Montana (Max Baucus), and Oregon (Ron Wyden) Each advertisement noted that the Senator's vote would be crucial to passage of legislation to repeal the estate tax, and encouraged listeners to contact the Senator's office to ask the Senator to support such legislation. (Dubke Aff. ¶ 11, Attachs. 8-12) None of these communications were produced within 60 days of a general election or 30 days of a primary election, and none contained any electoral component. (Dubke Aff. ¶¶ 9-12)

In addition, AJS sponsored a series of television communications concerning the legislation to establish the asbestos trust fund in early 2006. The purpose of the advertisements was to generate opposition to the asbestos trust fund legislation that was being considered by the United States Senate. The communications criticized the policy positions of Republican Senators

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supporting the legislation, and praised the policy positions of Democratic Senators opposing the legislation. Affidavit of Michael D. Duble (MUR 5910), ¶6, attached hereto as Exhibit 29 (AJS 000993-000998) ("Duble MUR 5910 Aff.") Part of this effort involved communications that were distributed in the following states criticizing the asbestos trust fund policy positions of the following Republican Senators: Alabama (Sen. Sessions), Arizona (Sen. Kyl), Idaho (Sens. Craig and Crapo), Kentucky (Sens. Bunning and McConnell), Mississippi (Sen. Lott), Montana (Sen. Burns), New Hampshire (Sens. Gregg and Sununu), Oklahoma (Sen. Coburn), South Dakota (Sen. Thune), Utah (Sens. Bennett and Hatch), and Wyoming (Sens. Enzi and Thomas) (Id. ¶7.) The advertisements that were distributed in North Dakota, on the other hand, praised the public policy positions of Senators Kent Conrad and Byron Dorgan for opposing the asbestos trust legislation and fighting for small businesses and the jobs they create. (Id. ¶8.) None of the AJS asbestos trust fund communications aired within 30 days of a primary election or 60 days of the general election, nor did they contain any language expressly advocating the election or defeat of any federal candidate. (Id. ¶9.)

### III. FACTUAL AND LEGAL ANALYSIS.

The Commission's case-by-case political committee theory is still the subject of litigation. See *Shays II*, 424 F. Supp. 2d 100. However, the Commission has indicated that it will continue to determine a group's status using this approach. As stated in the supplemental justification to the political committee status regulation, the Commission conducts a three part test to determine whether an organization triggers political committee status:

In each of these Political Committee Status Matters, the Commission conducted a thorough investigation of all aspects of the organization's statements and activities to determine first if the organization exceed the \$1,000 statutory and regulatory threshold for expenditures or contributions in 2 U.S.C. § 431(4)(A) and 11 C.F.R. 100.5(a), and then whether the organization's major purpose was federal campaign activity.

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72 Fed. Reg. at 5603-5604. With respect to the expenditure path, the Commission analyzed each group's communications to determine whether they constituted "express advocacy" under 11 C.F.R. § 100.22(b). The contribution path, on the other hand, was examined under the Commission's interpretation of FEC v. Survival Education Fund, Inc., 65 F.3d 285 (2<sup>nd</sup> Cir. 1995) ("SEF") for pre-2005 requests for funds. Finally, if an organization satisfies either the expenditure or contribution threshold, the Commission examines whether the organization's major purpose was federal campaign activity.

As explained more fully below, there is no factual or legal basis for finding reason to believe in this matter. First, no AJS communication constitutes express advocacy under Buckley's magic-word test or the expanded "reasonable person" standard under 11 C.F.R. § 100.22(b). Second, AJS does not make solicitations. Rather, AJS's funds come from member dues. In any event, none of the financial correspondence with members or potential members resulted in contributions under either SEF or the Commission's political committee status rule. Finally, AJS's major purpose is not electoral activity as erroneously alleged in the Complaint. AJS's major purpose is to advance the pro-business, economic prosperity agenda of its members.

A. AJS does not satisfy the expenditure path to political committee status because none of the AJS communications constitute express advocacy under 11 C.F.R. §§ 100.22(a) or (b).

1. The AJS advertisements listed in complaint do not constitute "express advocacy" under 11 C.F.R. § 100.22(a) and, therefore, do not qualify as expenditures under the Act or Commission Regulations.

Under Buckley v. Valeo, 424 U.S. 1 (1976), only communications that in express terms advocate the election or defeat of a clearly identified candidate or group of candidates are considered "expenditures" subject to regulation under the Act by the Commission. 424 U.S. at 44 n. 52; 11 C.F.R. § 100.22(a). This bright line test has been repeatedly upheld by the Supreme Court and other federal courts. See, e.g., FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 249 (1986).

(reaffirming the Buckley express advocacy standard for determining whether a communication constitutes an "expenditure"), Maine Right to Life Comm., Inc. v. FEC, 98 F.3d 1 (1<sup>st</sup> Cir. 1996) (affirming district court ruling invalidating section 100.22(b) because it impermissibly chills political speech).

BCRA did not eliminate the "express advocacy" requirement for expenditures on communications made independently of federal candidates. 72 Fed. Reg. 5595, 5597 (2007). In McConnell v. FEC, the United States Supreme Court did not change the "express advocacy" requirement.<sup>3</sup> 540 U.S. 93 (2003). In fact, several federal circuit courts have held that the "express advocacy" requirement survived McConnell intact in cases involving state statutes. See, e.g., Anderson v. Spear, 356 F.3d 651, 664 (6<sup>th</sup> Cir. 2004) (noting McConnell "left intact the ability of courts to make distinction between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest."); Center for Individual Freedom v. Carmouche, 449 F.3d 655 (5<sup>th</sup> Cir. 2006), cert. denied, 549 U.S. \_\_\_ (2007) ("McConnell does not obviate the applicability of Buckley's line-drawing exercise where, as in this case, we are confronted with a vague statute") (citations omitted).

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<sup>3</sup> In fact, the Fifth Circuit noted

We are aware of the McConnell Court's assertions that "the presence or absence of magic words cannot meaningfully distinguish electorally speech from a true issue ad," that "Buckley's magic-words requirement is functionally meaningless," and that "Buckley's express advocacy line has not aided the legislative effort to combat real or apparent corruption." Those statements, however, were made in the context of the Court's determination that a distinction between express advocacy and issue advocacy is not constitutionally mandated. The Court said nothing about the continuing relevance of the magic words requirement as a tool of statutory construction where a court is dealing with a vague campaign finance regulation.

In light of this silence, we must assume that Buckley remains good law in such circumstances.

Center for Individual Freedom, 449 F.3d at 666 n. 7 (citations omitted). Therefore, any notion that the Commission can enforce a regulation that goes beyond Buckley's magic words construction is misplaced.

Moreover, the Commission's supplemental E&J places great emphasis on the Supreme Court's limiting construction of the definition of "political committee" set forth in Buckley. See 72 Fed. Reg. 5597. Therefore, the Commission concedes that Buckley's commands concerning the application of the political committee definition are still controlling, even after McConnell. The Supreme Court specifically narrowed the reach of the political committee definition:

To ensure that the reach of section 434(e) is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of section 608(e) to reach only funds used for communications that expressly advocate [FN108] the election or defeat of a clearly identified candidate.

424 US at 80. In fact, the footnote cited in this passage refers only to footnote 52 in the opinion – the footnote that provides for the so-called "magic words" express advocacy test. See id. at 80 n 108. Accordingly, the Supreme Court reasoned that the political committee definition does not apply to all groups that discuss candidates or their policy positions since the expenditure path may be satisfied only with express advocacy communications pursuant to footnote 52. Id. at 80 ("As narrowed, section 434, like section 608(e)(1), does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result.")<sup>6</sup>

In the present matter, none of the AJS communications listed in the Complaint expressly call for the election or defeat of any federal candidate. None of the communications instruct recipients

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<sup>6</sup> In FEC v. Massachusetts Citizens for Life, Inc., the Supreme court reaffirmed Buckley's commands that an organization must engage in the so-called "magic words" express advocacy for purposes of determining whether it satisfies the definition of political committee under the Act. FEC v. Massachusetts Citizens for Life, Inc., 479 US 238 (1986) ("MCL").

We therefore hold that an expenditure must constitute "express advocacy" in order to be subject to the prohibition of § 441b. Buckley adopted the "express advocacy" requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons. We therefore concluded in that case that a finding of "express advocacy" depended upon the use of language such as "vote for," "elect," "support," etc., Buckley, supra at 44, n 52, 96 S Ct at 646, n. 52.

Id. at 249 (emphasis added). The interpretation given to a statute by the Supreme Court is the law and must be given effect. Fischer v. FEC, 928 F 2d 468, 471 (1<sup>st</sup> Cir 1991) ("an interpretation given a statute by the Supreme Court becomes the law and must be given effect. It is not the role of the FEC to second-guess the wisdom of the Supreme Court.") (citations omitted).

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to "vote for," "re-elect," "support," "defeat," or otherwise take any electoral action with respect to any federal candidate. Rather, the consistent message in each of the communications is for the viewer, listener, or recipient to contact the identified public official or public figure to express their views on the issues discussed in the communication. (Dubke MUR 5910 Aff. ¶ 4, Attach. A.) In fact, Public Citizen conceded that AJS's communications do not constitute expenditures under Buckley or 11 C.F.R. § 100.22(a) in its press release concerning the complaint and the complaint itself. Public Citizen Press Release (April 11, 2007), PCIRS Compl. at 3. Clearly, none of the AJS advertisements constitute express advocacy under Buckley's test and 11 C.F.R. § 100.22(a).

2. Since each AJS communication contains an explicit request that the public contact the identified public official or public figure concerning the issues discussed in the communications, none of the communications constitute express advocacy under 11 C.F.R. 100.22(b).

Public Citizen's allegations that AJS's communications constitute express advocacy is premised entirely on 11 C.F.R. § 100.22(b). This regulation suggests, notwithstanding the commands of Buckley, that in the absence of explicit words advocating the election or defeat of a clearly identified federal candidate, a communication may also be a form of express advocacy when, taken as a whole and with limited reference to external events, it can only be interpreted by a reasonable person as unmistakably, unambiguously, and suggestive of only one meaning that advocates the election or defeat of one or more clearly identified candidate(s).<sup>7</sup> See id.

The Commission's Explanation & Justification ("E&J") for section 100.22(b) provides a further explanation concerning what types of communications will be considered express advocacy

<sup>7</sup> At least three federal courts have held that section 100.22(b) is invalid and unenforceable. See, e.g., Maine Right to Life Comm., Inc. v. FEC, 98 F.3d 1 (1<sup>st</sup> Cir. 1996), Virginia Soc'y for Human Life, Inc. v. FEC, 263 F.3d 379, 392 (4<sup>th</sup> Cir. 2001), Right to Life of Dutchess County v. FEC, 6 F. Supp. 2d 248 (S.D.N.Y. 1998). In addition, several federal courts have held after McConnell that the express advocacy standard established in Buckley continues to limit the reach of vague campaign finance statutes. See Center for Individual Freedom, Supra n 4. Accordingly, McConnell did not resurrect section 100.22(b) from constitutional infirmity and the Commission should not use it as a basis for making a reason to believe finding against Respondents. Nonetheless, we will analyze AJS's communications under section 100.22(b) in this Response. This analysis, however, must not be interpreted or construed as a waiver of our position that section 100.22(b) remains unconstitutional under the federal court decisions cited above.

under the expanded definition. See 60 Fed. Reg. 35292 (1995) "Communications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy under new section 100 22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question." *Id.* at 35295 (emphasis added).

However, this standard applies only when a communication contains "no specific call to take action on any issue or to vote for a candidate. . ." *Id.* (emphasis added). Communications containing a non-electoral call to action such as contacting the individual identified in the communication must be analyzed under a four-corners reading of the action urged.

The Commission also noted that "the revised rules in section 100 22(b) do not affect pure issue advocacy, such as attempts to create support for specific legislation, or purely educational messages." *Id.* (emphasis added). The Commission provided two message examples to illustrate express advocacy versus some other type of message.

"For example, the rules do not preclude a message made in close proximity to a Presidential election that only asked the audience to call the President and urge him to veto a particular bill that has just passed, if the message did not refer to the upcoming election or encourage election-related actions. In contrast, under these rules, it is express advocacy if the communication described above urged the audience to vote against the President if the President does not veto the bill in question

*Id.* (emphasis added). Thus, section 100 22(b) emphasizes that "the electoral portion of the communication must be unmistakable, unambiguous, and suggestive of only one meaning, and reasonable minds could not differ as to whether it encourages election or defeat of candidates or some other type of non-electoral action." *Id.* (emphasis added). Therefore, an express advocacy communication must contain a message that constitutes an unmistakable, unambiguous request for some type of electoral action concerning the election or defeat of a candidate.<sup>8</sup>

<sup>8</sup> The American Heritage Dictionary defines "unmistakable" as "impossible to mistake or misinterpret, obvious." The American Heritage of the English Language, Fourth Edition (2004), <http://dictionary.reference.com/browse/unmistakable> (accessed May 21, 2007). "Unambiguous" is defined as "having or exhibiting no ambiguity or uncertainty, clear." *Id.*

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Any non-electoral request for action such as calling the government official or public figure referenced in the communication is – at the very least – susceptible to more than one meaning under section 100.22(b)'s reasonableness standard.<sup>9</sup> Moreover, since the electoral portion must be unmistakable, unambiguous, and suggestive of only one meaning, any doubt concerning the meaning of a phrase or word must be resolved in favor of a finding of no express advocacy. As the Ninth Circuit held in Furgatch:

[S]peech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action. We emphasize that if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements.

807 F.2d at 864. Therefore, if a communication contains an explicit call to take some type of non-electoral action, the Commission cannot supply a meaning to the words that is incompatible with the clear import of the words. See Furgatch, 807 F.2d at 863-64. As discussed fully below, each AJS communication discusses governmental issues and asks the listeners, viewers or recipients to contact the referenced government official or public figure and express their views – an unmistakable, unambiguous, non-electoral action.

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<sup>9</sup> In FEC v. Furgatch, the Ninth Circuit case the Commission cites as the legal basis for 11 C.F.R. § 100.22(b), the court commands that the analysis of any communication under the case's express advocacy test must focus on the action advocated. See 807 F.2d 857, 864-65 (9<sup>th</sup> Cir. 1987) ("The pivotal question is not what the reader should prevent Jimmy Carter from doing, but what the reader should do to prevent it. The words we focus on are 'don't let him.'") Thus, the proper focus of any express advocacy inquiry under the expanded definition must be on the command of some type of action, and not the effect or intent of the communication. Id. at 863-64 ("Our concern here is with the clarity of the communication rather than its harmful effects. [C]ontext cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words.") As discussed below, the call to action in each AJS communication commands the recipient, listener or viewer to contact the governmental official or public figure referenced in the advertisement concerning the issues discussed in the communication. Contacting a public figure concerning an issue is an unmistakable, unambiguous, non-electoral call to action and does not satisfy the definition of express advocacy under Furgatch or section 100.22(b).

**1. Matter Under Review 5634.**

In MUR 5634 (Sierra Club), the Commission provides a window into its new analysis under section 100.22(b). In releasing the Conciliation Agreement in MUR 5634, the Commission declared that "[t]his is one of the most important express advocacy cases the Commission has resolved in recent years" and that this case can "provide further guidance to the public on the appropriate scope of the express advocacy test." Commission Press Release (November 15, 2006) (Exhibit 2, AJS 000064-000065), *see also* 72 Fed. Reg. 5604 n 19. Accordingly, the OGC's and Commission's analysis of Section 100 22(b) in MUR 5634 provides a framework for analyzing a communication under the expanded definition of express advocacy

The Complainant in this MUR alleged that four pamphlets produced and distributed in 2004 by the Sierra Club constituted express advocacy by advocating Senator John Kerry's election as President MUR 5634 Compl at 1. The four pamphlets – "Conscience," "Friend," "The Environment for Dummies" or "TED," and "The Dirt" – each discussed the environmental policy positions, actions or proposals of federal candidates and included a call to action (See Exhibits 3-6). Listed below are brief descriptions of each pamphlet and the Commission's express advocacy determination:

- **"Conscience"**: This pamphlet compared the environmental records of Senator Kerry and President Bush and those of US Senate candidates Mel Martinez and Betty Castor (See Exhibit 3, AJS 000066-000068) The front of the pamphlet exhorted the reader to "Let your conscience be your guide" and the heading on the interior stated "And let your vote be your voice " The pamphlet also contained a checklist for environmental issues that clearly favored the Democratic candidates. The Commission determined that the combination of the checklists favoring the Democratic candidates and the exhortations discussed above were suggestive of only one meaning and that "reasonable minds could not differ as to the action urged." MUR 5634 OGC Report # 2 at 14 Accordingly, the Commission approved a Conciliation Agreement with the Sierra Club finding that the "Conscience" pamphlet constituted express advocacy and a prohibited corporate expenditure under the Act See Sierra Club, Inc. Conciliation Agreement (MUR 5634)
- **"Friend"**: This pamphlet emphasized Senator Kerry's Senate record on environmental issues and directed the reader to email him at his Senate website " and ask him to continue

protecting our environment." MUR 5634 OGC Report # 2 at 16. The pamphlet did not reference any specific pending legislation (See Exhibit 4; AJS 000069-000070.) However, the OGC determined that "[s]ince Kerry was a Senator, he was positioned to vote on or sponsor environmental legislation " MUR 5634 OGC Report # 2 at 16. The pamphlet also "did not refer to voting or any election " *Id.* Thus, the OGC determined, and the Commission agreed, that the pamphlet did not contain an electoral portion that was unmistakable, unambiguous, and suggestive of only one meaning *Id.*

- **"TED"**: This pamphlet negatively portrayed the President's environmental record and directed readers to email the President and "tell him to stand up to corporate polluters " *Id.* The pamphlet also contained the line "this year, our vision counts " (See Exhibit 5; AJS 000071-000072) The OGC determined, and the Commission agreed, that the President was in a position "to stand up to corporate polluters" whether or not he was running for re-election. MUR 5634 OGC Report # 2 at 16 Thus, the pamphlet did not contain an electoral portion that was unmistakable, unambiguous, and suggestive of only one meaning. *Id.*
- **"The Dirt"**: This pamphlet was similar to "Conscience" discussed above in that it identifies President Bush and Senator Kerry and contained narratives concerning their environmental positions. MUR 5634 OGC Report # 2 at 16-17. The pamphlet directed readers to "dig deeper for facts about the candidates for president" and to "check the facts". *Id.* at 17(emphasis added), (see Exhibit 6; AJS 000073-000075). The OGC concluded:

While the communication suggests to the reader that the Sierra Club views Senator Kerry's environmental record as better than President Bush's, it could reasonable be interpreted as encouraging readers simply to become better informed. Thus, because reasonable minds could differ as to the action it urges, "The Dirt" does not contain "express advocacy" as defined in Section 100 22(b)

*Id.* Therefore, the OGC determined, and the Commission agreed, that this pamphlet does not contain express advocacy under the expanded definition despite the fact that it referenced individuals in their capacity as candidates, invited the recipients to become better informed about the candidates, and the contents favored Senator Kerry on environmental issues. *Id.*

Accordingly, the OGC's recommendations, and the Commission's findings, in this matter demonstrate that outside groups are permitted to discuss in their communications the public policy positions of government officials and public figures, indicate a preference for one candidate over another in the context of contrast communications, refer to individuals as candidates, identify the election year, and even urge the public to become better informed about the candidates without satisfying the definition of express advocacy under 11 C.F.R. § 100 22(b).

11. Since each AJS communication contains an explicit non-electoral call to action, they do not satisfy the definition of express advocacy under 11 C.F.R. § 100 22(b).

AJS's communications do not constitute express advocacy even under this expanded standard. It is beyond question that none of the AJS communications exhort the public to campaign for or contribute to any federal candidate. See 72 Fed. Reg. 5604 ("Express advocacy also includes exhortations 'to campaign for, or contribute to, a clearly identified candidate'") Nor do they explicitly refer to any individual as a candidate or reference an election. MUR 5634 OGC Report # 2 at 16. As explained more fully below, each communication discusses public policy issues, the public official or public figure's position on the issue, and asks the public to contact the person and communicate their views.

Listed below are the communications listed in the Complaint that were distributed in calendar year 2002 and thereafter along with an analysis of each communication under the express advocacy standards discussed above.<sup>10</sup> The communications are listed below according to the number listed in the complaint.

#### Complaint Communication # 9

Script: Narrator: "He meets folks in small town cafes and fairground meeting rooms, Senator Wayne Allard. The Rocky Mountain News has called him the 'traveling man' for nearly 500 town meetings he's held since becoming a Senator. A veterinarian by trade, born and raised in Colorado, Wayne Allard has been a steady hand in Washington, instrumental in President Bush's No Child Left Behind Act, a citizen legislator. Call Senator Allard. Tell him thanks for standing up for Colorado and a strong America."

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<sup>10</sup> In addition to the documentation supporting the communications listed in this response, we are submitting copies of the relevant legislation that was pending when Complaint Communications 10, 12, 14, and 16 were distributed. The pending legislation for Communications 10, 12, 14, and 16 is attached at Exhibit A. Legislation or public policies were also pending concerning issues discussed in the other advertisements. The attached legislation specifically refutes Public Citizen's erroneous allegation that none of the communication were distributed when pertinent public policies were being considered by Congress or another relevant governmental agency. See PCFEC at 2-3.

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**Analysis:** As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a) See Buckley, 424 U.S. at 44 n 52

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to constituent service and the President's signature education legislation, the "No Child Left Behind Act" ("NCLBA") (See Exhibit 7, AJS 000076-000093) The NCLBA was a major issue in 2001 and continues to be a hotly debated issue to this day. The Congress routinely considers and votes on bills affecting the issues in this legislation. The communication specifically requests that the viewer contact Senator Allard to discuss these issues. Senator Allard was in a position to strengthen constituent service and promote education issues and legislation. See MUR 5634 OGC Report # 2 at 16. Moreover, the communication does not refer to Senator Allard as a candidate, reference an election, or exhort the public to campaign for or contribute to the Senator. See 72 Fed. Reg. 5604 Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b).

Finally, this communication was distributed before BCRA's effective date. Therefore, it is not subject to the ban on the use of corporate funds to sponsor electioneering communications pursuant to 2 U.S.C. § 441b(b)(2).

**Complaint Communication # 10**

**Script:** Ruth: "Lloyd, we just got a letter from the IRS."

**Lloyd:** "Ruth, what's wrong?"

**Ruth:** "They say we owe more taxes."

**Lloyd:** "Bull -- Dad always paid his taxes even in the worst of times."

Ruth: "We owe taxes 'cause he died?"

Lloyd: "He paid taxes when he worked. He paid taxes on this land. Now he dies and he has to pay more? Who'll the hell thought up that doozy?"

Ruth: "Senator Harkin just voted to keep the death tax."

Lloyd: "Tom Harkin actually voted to tax people 'cause they died?"

Ruth: "What's going to happen?"

Lloyd: "We're going to have to sell the farm."

Ruth: "No, Lloyd, we're going to call Tom Harkin and tell him our folks paid their fair share and to keep his money-grubbing hands off our farm."

Narrator: "Call Tom Harkin at 515-284-4574. Tell him to protect small businesses and family farms and to stop taxing the dead. Paid for by Americans for Job Security."

Analysis: As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a). See *Buckley*, 424 US at 44 n. 52.

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to the death tax. (See Exhibit 8; AJS 000094-000108.) During the 107<sup>th</sup> Congress, there were at least twenty-five bills introduced concerning the death tax.<sup>11</sup> The communication specifically requests that the viewer contact Senator Harkin to discuss the death tax issue. Senator Harkin was in a position to vote on or sponsor death tax legislation. See MUR 5634 OGC Report # 2 at 16. Moreover, the communication does not refer to Senator Harkin as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate. See 72 Fed. Reg. 5604. In addition, the Complaint alleges that the

<sup>11</sup> As stated before, AJS is submitting a sample of the death tax legislation that was pending at the time this communication was distributed. Copies of the legislation are attached to this brief as Attachment A. However, the summaries for each of the remaining communications discussed in this Response demonstrate that each advertisement addressed pertinent legislative and governmental topics that were being considered at the time the communication was distributed.

communication aired June 30, 2002, approximately four months before the federal general election. Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100 22(b)

Finally, this communication was distributed before BCRA's effective date. Therefore, it is not subject to the ban on the use of corporate funds to sponsor electioneering communications pursuant to 2 U.S.C. § 441b(b)(2).

#### Complaint Communication # 11

Script: Narrator: "Take a good look at Paul Wellstone. He is not who you think he is. Before Wellstone was elected, he promised he wouldn't take any PAC money, he said he was afraid he would lose his soul. Yet over the past two years, he has accepted over two million dollars in special interest money. And before Wellstone became a career politician, he also promised to only serve two terms. Now he's around for a third? Call Paul Wellstone, tell him promises are meant to be kept."

Analysis: As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100 22(a). See *Buckley*, 424 U.S. at 44 n. 52

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100 22(b). The issues discussed in this advertisement pertain to campaign finance and term limit issues. (See Exhibit 9; AJS 000109-000198.) Campaign finance reform issues— including the Bipartisan Campaign Reform Act — and ethics reform bills were debated and passed during the 107<sup>th</sup> Congress. The communication specifically requests that the viewer contact Senator Wellstone to discuss these issues. Senator Wellstone was in a position to vote on or sponsor legislation on these issues. See MUR 5634 OGC Report # 2 at 16. Moreover, the communication may be interpreted as request to call Senator Wellstone to inquire about his positions on these issues. See *id.* at 17. Importantly, the communication does not exhort the public to campaign for, or contribute to a federal candidate. See 72 Fed. Reg. 5604. While the communication does reference campaign finance issues such as

the acceptance of special interest funds and term limit issues, the plain language and video of the communication does not reference Senator Wellstone as a candidate or refer to an election. Good government practices were serious issues for the business community – issues that Senator Wellstone was in a position to affect. Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b)

Finally, this communication was distributed before BCRA's effective date. Therefore, it is not subject to the ban on the use of corporate funds to sponsor electioneering communications pursuant to 2 U.S.C. § 441b(b)(2)

#### Complaint Communication # 12

Script: Ruth. "Lloyd, we just got a letter from the IRS."

Lloyd. "Ruth, what's wrong?"

Ruth. "They say we owe more taxes."

Lloyd. "Bull -- Dad always paid his taxes even in the worst of times."

Ruth. "We owe taxes 'cause he died?"

Lloyd. "He paid taxes when he worked. He paid taxes on this land. Now he dies and he has to pay more? Who'll the hell thought up that doozy?"

Ruth. "Senator Wellstone just voted to keep the death tax."

Lloyd. "Paul Wellstone actually voted to tax people 'cause they died?"

Ruth. "What's going to happen?"

Lloyd. "We're going to have to sell the farm."

Ruth. "No, Lloyd, we're going to call Paul Wellstone and tell him our folks paid their fair share and to keep his money-grubbing hands off our farm."

Narrator: "Call Paul Wellstone at 651-645-0323. Tell him to protect small businesses and family farms and to stop taxing the dead. Paid for by Americans for Job Security."

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**Analysis:** As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a). See Buckley, 424 US at 44 n 52.

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to the death tax. (See Exhibit 10, AJS 000199-000208.) During the 107<sup>th</sup> Congress, there were at least twenty-five bills introduced concerning the death tax. The communication specifically requests that the viewer contact Senator Wellstone to discuss the death tax issue. Senator Wellstone was in a position to vote on or sponsor death tax legislation. See MUR 5634 OGC Report # 2 at 16. Moreover, the communication does not refer to Senator Wellstone as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate. See 72 Fed Reg 5604. In addition, the Complaint alleges that the communication aired on June 19, 2002, more than four months before the federal general election. Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b).

Finally, this communication was distributed before BCRA's effective date. Therefore, it is not subject to the ban on the use of corporate funds to sponsor electioneering communications pursuant to 2 U.S.C. § 441b(b)(2).

#### **Complaint Communication # 13**

**Script:** Narrator: "Jim Talent, 16 years in public service, working to improve the quality of life for Missouri's children and families. In Congress, he championed legislation to remove disruptive and violent students from classrooms, so kids could learn and be safe. As chairman of the Small Business Committee, he fought for affordable health insurance for uninsured employees of small businesses. A career working to make families safe and secure, and with three young children of his own he's not about to stop. Jim Talent. Experience makes a difference  
**Screen:** Write to Jim Talent at savejobs.com.

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**Analysis:** As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a) *See Buckley*, 424 US at 44 n 52.

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to education, business, and healthcare issues. (See Exhibit 11; AJS 000209-000336.) During this time period and in subsequent Congressional sessions, the issues of education, healthcare, and small business issues were considered and acted upon. The communication specifically requests that the viewer contact Congressman Talent to communicate his or her views on these issues *See* MUR 5634 OGC Report # 2 at 16. Moreover, the communication may be interpreted as a request to contact Congressman Talent to inquire about his positions on these issues *See id.* at 17. Importantly, the communication does not refer to Congressman Talent as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate *See* 72 Fed. Reg 5604. Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b).

Finally, this communication was distributed before BCRA's effective date. Therefore, it is not subject to the ban on the use of corporate funds to sponsor electioneering communications pursuant to 2 U.S.C. § 441b(b)(2).

#### **Complaint Communication # 14**

**Script:** Ruth: "Lloyd, we just got a letter from the IRS."

**Lloyd:** "Ruth, what's wrong?"

**Ruth:** "They say we owe more taxes."

**Lloyd:** "Bull -- Dad always paid his taxes even in the worst of times

**Ruth:** "We owe taxes 'cause he died?"

Lloyd: "He paid taxes when he worked. He paid taxes on this land. Now he dies and he has to pay more? Who'll the hell thought up that doozy?"

Ruth: "Senator Carnahan just voted to keep the death tax."

Lloyd: "Jean Carnahan actually voted to tax people 'cause they died?"

Ruth: "What's going to happen?"

Lloyd: "We're going to have to sell the farm."

Ruth: "No, Lloyd, we're going to call Jean Carnahan and tell her our folks paid their fair share to keep her money grubbing hands off our farm."

Narrator: "Call Jean Carnahan at 573-636-1070. Tell her to protect small businesses and family farms and to stop taxing the dead. Paid for by Americans for Job Security."

**Analysis:** As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a). See Buckley, 424 U.S. at 44 n. 52.

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to the death tax (See Exhibit 12; AJS 000337-000346.) During the 107<sup>th</sup> Congress, there were at least twenty-five bills introduced concerning the death tax. The communication specifically requests that the viewer contact Senator Carnahan to discuss the death tax issue. Senator Carnahan was in a position to vote on or sponsor death tax legislation. See MUR 5634 OGC Report # 2 at 16. Moreover, the communication does not refer to Senator Carnahan as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate. See 72 Fed. Reg. 5604. In addition, the Complaint alleges that the communication aired June 19, 2002, more than four months before the federal general election. Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b).

Finally, this communication was distributed before BCRA's effective date. Therefore, it is not subject to the ban on the use of corporate funds to sponsor electioneering communications pursuant to 2 U.S.C. § 441b(b)(2)

**Complaint Communication # 15**

Script: Narrator: "Jeanne Shaheen, can we still trust her? Before she became governor, Shaheen pledged to oppose any new taxes, but as governor, she broke her word. She proposed a new statewide property tax, a new sales tax, even a capital gains tax. Taxes that would hurt New Hampshire, taxes that would hurt families, taxes that would cost even more jobs. Call Jeanne Shaheen, tell her trust is more important than an empty slogan "

Analysis: As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a) See Buckley, 424 US at 44 n. 52.

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to the tax issues. (See Exhibit 13; AJS 000347-000430.) The issue of taxes increases was actively debated in New Hampshire at the time this communication aired. Then-Governor Shaheen proposed a series of tax increases to fund her educational initiatives. The communication specifically requests that the viewer contact Governor Shaheen to discuss the tax issues Governor Shaheen was in a position to affect tax policy in New Hampshire See MUR 5634 OGC Report # 2 at 16. Moreover, the communication does not refer to Governor Shaheen as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate. See 72 Fed. Reg. 5604. Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b)

Finally, this communication was distributed before BCRA's effective date. Therefore, it is not subject to the ban on the use of corporate funds to sponsor electioneering communications pursuant to 2 U.S.C. § 441b(b)(2).

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**Complaint Communication # 16**

**Script: Ruth. "Lloyd, we just got a letter from the IRS "**

**Lloyd: "Ruth, what's wrong?"**

**Ruth "They say we owe more taxes."**

**Lloyd. "Bull -- Dad always paid his taxes even in the worst of times**

**Ruth. "We owe taxes 'cause he died?"**

**Lloyd: "He paid taxes when he worked. He paid taxes on this land. Now he dies and he has to pay more? Who'll the hell thought up that doozy?"**

**Ruth: "Senator Johnson just voted to keep the death tax "**

**Lloyd "Tim Johnson actually voted to tax people 'cause they died?"**

**Ruth- "What's going to happen?"**

**Lloyd: We're going to have to sell the farm."**

**Ruth: "No, Lloyd, we're going to call Tim Johnson and tell him our folks paid their fair share to keep his money grubbing hands off our farm."**

**Narrator: "Call Tim Johnson at 605-332-8896 Tell him to protect small businesses and family farms and to stop taxing the dead Paid for by Americans for Job Security."**

**Analysis: As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a) See Buckley, 424 US at 44 n. 52.**

**Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b) The issues discussed in this advertisement pertain to the death tax. (See Exhibit 14; AJS 000431-000455) During the 107<sup>th</sup> Congress, there were at least twenty-five bills introduced concerning the death tax. The communication specifically requests that the viewer contact Senator Johnson to discuss the death tax issue. Senator Johnson was in a position to vote on or sponsor death tax legislation. See MUR 5634 OGC Report # 2 at 16 Moreover, the communication does not refer to Senator Johnson as a candidate, reference an election, or exhort the public to campaign for or**

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contribute to a federal candidate See 72 Fed. Reg. 5604 In addition, the Complaint alleges that the communication aired June 20, 2002, more than four months before the federal general election. Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b).

Finally, this communication was distributed before BCRA's effective date. Therefore, it is not subject to the ban on the use of corporate funds to sponsor electioneering communications pursuant to 2 U.S.C. § 441b(b)(2).

#### Complaint Communication # 17

**Script:** Narrator "Who is the real Ron Kirk? He claims to support President Bush but recently Kirk said he now opposes making the Bush tax cuts permanent. In fact, he thinks some of the tax cuts shouldn't even go into effect. Kirk says he supports Texas jobs, yet he's taken thousands from an extreme anti-defense group whose goals include cuts in America's space program. Even the *Houston Chronicle* reports Kirk to say one thing to the public, and another to the party insiders. Call lobbyist Ron Kirk. Ask him, who is the real Ron Kirk today?"

**Analysis:** As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a) See Buckley, 424 U.S. at 44 n. 52.

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to tax, business, and employment issues (See Exhibit 15; AJS 000456-000492) The communication specifically requests that the viewer contact Mayor Kirk to discuss these issues. See MUR 5634 OGC Report # 2 at 16 Moreover, the communication may be interpreted as request to contact Mayor Kirk to inquire about his positions on these issues. See id. at 17. Importantly, the communication does not reference an election, or exhort the public to campaign for or contribute to a federal candidate See 72 Fed. Reg. 5604. While the communication does reference campaign finance issues, the communication's plain language and video does not reference Mayor Kirk as a candidate. Good government practices were

serious issues for the business community – issues that Mayor Kirk was in a position to affect. Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b).

Finally, this communication was distributed before BCRA's effective date. Therefore, it is not subject to the ban on the use of corporate funds to sponsor electioneering communications pursuant to 2 U.S.C. § 441b(b)(2).

#### Complaint Communication # 18

Script: TV ad opens with a woman speaking to the audience "When Tony Knowles was governor, I had a great many friends that chose to leave Alaska. They didn't actually choose – they had to leave Alaska, because there weren't opportunities here."

Man tells viewers: "You can't just drive to the next town to find work. You'd have to literally leave your home, there's nowhere else to go."

Second man: "Probably Alaska's greatest export is our children searching for jobs."

The woman concludes: "Tony Knowles may think flipping burgers is a good job, but it's not the future I want for my daughters."

The screen reads: "Ask Tony Knowles his plans to bring our children back to Alaska."

Analysis: As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a). See *Buckley*, 424 U.S. at 44 n. 52.

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to business and employment issues. (See Exhibit 16; AJS 000493-000550) At the time this communication aired, Alaska was facing an unemployment crisis. The lack of jobs was causing young adults to leave the state in search of employment opportunities elsewhere. This in turn negatively impacted the small business community in the state. The communication specifically requests that the viewer contact Governor

Knowles to discuss these issues. See MUR 5634 OGC Report # 2 at 16. Moreover, the communication may be interpreted as request to contact Governor Knowles to inquire about his positions on these issues. See id. at 17. Importantly, the communication does not refer to Governor Knowles as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate. See 72 Fed. Reg. 5604. In addition, the Complaint alleges that the communication aired July 7, 2004, approximately four months before the federal general election. Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b).

Finally, this television communication was not broadcast within thirty days of a primary election or sixty days of a general election. Therefore, it does not violate the ban on the use of corporation funds to sponsor electioneering communications under 2 U.S.C. § 441b(b)(2).

#### Complaint Communication # 19

Script: Narrator: "Summitville Mine. A Canadian company pulled \$130 million worth of gold out of Colorado, but left behind the worst cyanide spill in American history. Seventeen miles of dead river. Over \$230 million in estimated clean-up costs. Ken Salazar ran the Department of Natural Resources at the time, and his agency's lax oversight was blamed in part of the disaster. To make matters worse, as attorney general, Ken Salazar cut deals with the foreign millionaire responsible, and others, rather than fight to get more money for the clean-up. The result? Summitville mine produces \$130 million worth of gold and the worst environmental disaster in Colorado history. The person responsible pays less than \$30 million toward the clean-up, sticking taxpayers with a bill of more than \$100 million . . . and counting. Call Ken Salazar and tell him to fight for Colorado taxpayers for a change."

Analysis: As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a). See Buckley, 424 U.S. at 44 n. 52.

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to the environment and government oversight of a toxic spill. (See Exhibit 17; AJS 000551-000617) The Summitville mine leaked cyanide-laced

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wastes into Colorado's rivers. The Canadian firm that owned the mine declared bankruptcy and was not required to post a bond to fund the clean-up efforts. The taxpayers were stuck with the costs of cleaning up the contamination. This issue was an ongoing problem for Colorado government officials, including then-Attorney General Salazar. The communication specifically requests that the viewer contact Attorney General Salazar to discuss these issues. See MUR 5634 OGC Report # 2 at 16. Then-General Salazar was in a position at the time the communication aired to affect the issues discussed in the communication. Moreover, the communication may be interpreted as a request to contact Attorney General Salazar to inquire about his positions on these issues. See *id.* at 17. Importantly, the communication does not refer to Attorney General Salazar as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate. See 72 Fed. Reg. 5604. Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b).

Finally, the flight dates for the communication were August 20, 2004 through September 2, 2004. (Duke MUR 5910 Aff. ¶ 5) The communication did not air on August 8, 2004, as alleged in the Complaint. Therefore, this television communication was not broadcast within 30 days of a primary election or sixty days of a general election. The communication did not violate the ban on the use of corporation funds to sponsor electioneering communications under 2 U.S.C. § 441b(b)(2).

#### Complaint Communication # 20

**Script:** Text of direct mail piece mailed to a resident of Bradenton, Fla.. "John Kerry voted against a comprehensive prescription drug benefit making prescription drugs more affordable and accessible to seniors.

"But it gets worse.

"Kerry wants to repeal the prescription drug benefits seniors now receive. Kerry's prescription for failure: fewer choices, more government, more paperwork, higher costs.

"Call Senator Kerry at (202) 224-2742 and let him know that American seniors deserve better."

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**Analysis:** As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a). See Buckley, 424 U.S. at 44 n 52

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to prescription drug and senior citizen issues (See Exhibit 18; AJS 000618-000642) At least 51 bills pertaining to prescription drug benefits were introduced and considered in the 108<sup>th</sup> Congress. The communication specifically requests that the viewer contact Senator Kerry to discuss these issues See MUR 5634 OGC Report # 2 at 16 Moreover, the communication may be interpreted as request to contact Senator Kerry to inquire about his positions on these issues. See id. at 17 Importantly, the communication does not refer to Senator Kerry as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate See 72 Fed. Reg. 5604 Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b)

Finally, this communication was a mail piece, and not a television or radio communication broadcast within thirty days of a primary election or sixty days of a general election. Therefore, it does not violate the ban on the use of corporation funds to sponsor electioneering communications under 2 U.S.C. § 441b(b)(2)

#### Complaint Communication # 21

**Script:** Text of direct mail piece mailed to a resident of Bradenton, Fla " John Kerry. Healthcare headache.

"John Kerry's plan for healthcare means fewer choices for seniors, more government control, boxes of new paperwork and higher healthcare and drug costs.

"But it gets worse Kerry wants to repeal the prescription drug benefits seniors now receive.

"Call Senator Kerry at (202) 224-2742 and let him know that American seniors deserve better."

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**Analysis:** As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a) See Buckley, 424 US at 44 n. 52.

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to prescription drug and senior citizen issues. (See Exhibit 19, AJS 000643-000657). At least 51 bills pertaining to prescription drug benefits were introduced and considered in the 108<sup>th</sup> Congress. In addition, a number of other bills were introduced and considered pertaining to the issue of healthcare spending. The communication specifically requests that the viewer contact Senator Kerry to discuss these issues. See MUR 5634 OGC Report # 2 at 16. Moreover, the communication may be interpreted as request to contact Senator Kerry to inquire about his positions on these issues. See id. at 17. Importantly, the communication does not refer to Senator Kerry as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate. See 72 Fed. Reg. 5604. Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b).

Finally, this communication was a mail piece, and was not a television or radio communication broadcast within thirty days of a primary election or sixty days of a general election. Therefore, it does not violate the ban on the use of corporation funds to sponsor electioneering communications under 2 U.S.C. § 441b(b)(2).

#### **Complaint Communication # 22**

**Script:** Text of direct mail piece mailed to a resident of Sarasota, Fla.: "The cost of prescription drugs is skyrocketing. And, seniors too often have had to pay the full price.

"But, John Kerry didn't do anything about it. In fact, Kerry has missed 36 votes making prescription drugs more affordable and accessible to senior citizens and giving seniors more choices.

and better benefits. That's right. Kerry let us down 36 times when we needed him to pass the biggest improvement in senior health care in almost 40 years

"But it gets worse. Now, he says that he wants to repeal the prescription drug plan, which was endorsed by the AARP. Kerry's plan will result in fewer choices, more government, more paperwork and higher costs "

"Call Senator Kerry at (202) 224-2742 and let him know that American seniors deserve better."

**Analysis:** As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a) See Buckley, 424 U.S. at 44 n 52.

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to prescription drug and senior citizen issues. (See Exhibit 20, AJS 000658-000667) At least 51 bills pertaining to prescription drug benefits, and 21 bills pertaining to prescription drug costs, were introduced and considered in the 108<sup>th</sup> Congress. The communication specifically requests that the viewer contact Senator Kerry to discuss these issues. See MUR 5634 OGC Report # 2 at 16 Moreover, the communication may be interpreted as request to contact Senator Kerry to inquire about his positions on these issues. See id. at 17. Importantly, the communication does not refer to Senator Kerry as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate. See 72 Fed. Reg 5604. Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b)

Finally, this communication was a mail piece, and was not a television or radio communication broadcast within thirty days of a primary election or sixty days of a general election Therefore, it does not violate the ban on the use of corporation funds to sponsor electioneering communications under 2 U.S.C. § 441b(b)(2)

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**Complaint Communication # 23**

**Script: Narrator "What will it take to get North Carolina moving? Experience. Leadership Richard Burr. In Congress, Burr fought to keep jobs here, while attracting new businesses. He blocked unfair trade practices seven times, voting against giving China special trade status. A small businessman for 17 years, Burr has the leadership required to protect jobs of our working families. Call Richard Burr. Tell him thanks for being a conservative, common sense voice for North Carolina."**

**Analysis: As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a). See Buckley, 424 U.S. at 44 n. 52.**

**Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to business, foreign trade and employment issues (See Exhibit 21, AJS 000668-000690.) The issues of trade, unfair trade practices by the Chinese, and Most Favored Nation status for the Chinese were, and are, topics of legislation and debate in the Congress. North Carolina's manufacturing and textile base have been decimated by unfair trade practices by our trading partners. These practices have resulted in the loss of jobs across the nation, including North Carolina. Especially hard hit are small business owners. The communication specifically requests that the viewer contact then-Congressman Burr to discuss these issues. See MUR 5634 OGC Report # 2 at 16. Then-Congressman Burr was in a position to affect the issues discussed in the advertisement. Moreover, the communication may be interpreted as request to contact then-Congressman Burr to inquire about his positions on these issues. See *id.* at 17. Importantly, the communication does not refer to then-Congressman Burr as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate. See 72 Fed. Reg. 5604. In addition, the Complaint alleges that the communication aired June 10, 2004, approximately five months before the federal general election. Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b).**

Finally, this television communication was not broadcast within thirty days of a primary election or sixty days of a general election. Therefore, it does not violate the ban on the use of corporation funds to sponsor electioneering communications under 2 U.S.C. § 441b(b)(2)

**Complaint Communication # 24**

**Script:** Text of recorded telemarketing call "I'm calling to let you know that Tim Holden voted to increase taxes on Social Security by 70 percent

"You will be receiving mail concerning Holden's record of raising taxes on seniors, small businesses and working families."

"This recorded call is from Americans for Job Security."

"Not only did Holden vote to raise taxes on working seniors by 70 percent but, when given the chance to fix his mistake and reduce taxes on seniors, Holden voted no "

"Keep an eye on your mailbox."

**Analysis:** As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a) See *Buckley*, 424 US at 44 n. 52

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this phone call pertain to tax and senior citizen issues. (See Exhibit 22, AJS 000691-000725). During the 108<sup>th</sup> Congress, 38 bills were introduced and considered pertaining to tax increases 1,000 bills pertaining to social security, six bills pertaining to social security tax increases, twelve bills pertaining to small business tax issues, and 20 bills pertaining to family taxes and credits were considered by the same Congress The communication specifically informs the recipient that a piece of mail will be arriving in the near future discussing these issues The mail piece referenced in the telephone call specifically requests that the recipient contact Congressman Holden to discuss these issues. See MUR 5634 OGC Report # 2 at 16 Moreover, the communication may be interpreted as a request to contact Congressman Holden to inquire about his positions on these issues See *id.* at 17 Importantly, the communication does not refer to

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Congressman Holden as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate. See 72 Fed. Reg. 5604. Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b)

Finally, this communication was a telephone call, and not a radio or television communication that was broadcast within thirty days of a primary election or sixty days of a general election. Therefore, it does not violate the ban on the use of corporation funds to sponsor electioneering communications under 2 U.S.C. § 441b(b)(2)

#### Complaint Communication # 25

**Script:** Narrator: "The Tenenbaum education plan: No Bureaucrat Left Behind. In four years, Tenenbaum doubled the number of bureaucrats making more than \$50,000 per year, while schools were forced to cut teaching positions. In one year alone, her department spent more than \$4 million on travel and over \$675,000 on catered meals. Now she wants even more as much as \$2 billion in new taxes Inez Tenenbaum. Wasteful spending and higher taxes "

The screen reads: "Call Inez Tenenbaum and tell her we don't need her wasteful spending and higher taxes "

**Analysis:** As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a). See Buckley, 424 US at 44 n 52.

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to education and tax issues (See Exhibit 23; AJS 000726-000819.) During the time this communication aired, South Carolina was facing a school funding crisis. The state's financial crisis caused cuts in the teacher ranks, which caused an increase in the number of pupils per classroom. At the same time, Superintendent Tenenbaum hired more bureaucrats in the school systems. The communication specifically requests that the viewer contact Education Superintendent Tenenbaum to discuss these issues. See MUR 5634 OGC Report # 2 at 16. Ms. Tenenbaum was in a position to affect these policies. Moreover, the communication may

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be interpreted as request to contact Education Superintendent Tenenbaum to inquire about her positions on these issues See xl at 17. Importantly, the communication does not refer to Education Superintendent Tenenbaum as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate. See 72 Fed. Reg. 5604. In addition, the Complaint alleges that the communication aired on August 3, 2004, almost four months before the federal general election. Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b).

Finally, this television communication was not broadcast within thirty days of a primary election or sixty days of a general election. Therefore, it does not violate the ban on the use of corporation funds to sponsor electioneering communications under 2 U.S.C. § 441b(b)(2).

#### Complaint Communication # 26

Script: Male: "You can't make this up. According to the *San Antonio Express News*, Tommy Merritt introduced a quote stupid bill that would allow people to simply hand a police officer a pre-paid coupon when they got pulled over for speeding.

Female: "Our tax dollars hard at work."

Male: "No wonder Merritt doesn't get anything done in Austin."

Female: "What do you mean?"

Male: "Well, in eight years, Merritt's passed exactly eight bills and he's never earned any kind of leadership role. I always wondered how he did down there."

Female: "Well, unfortunately, he still tries to get things done. He recently announced his support for expanding the state sales tax to include nearly all services, like auto repair and funeral services. He even wants to tax health care. As if health care wasn't already expensive enough."

Male: "That's Tommy Merritt. Stupid bills and higher taxes."

Narrator: "Call Tommy Merritt at 903-238-9100, and tell him to stop wasting his time trying to raise our taxes." Paid for by Americans for Job Security

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**Analysis:** This script deals only with state issues and no one referenced in the communication was a federal candidate at the time it was distributed. Therefore, the Commission does not have jurisdiction over this communication. This communication demonstrates that AJS's major purpose is not federal campaign activity as alleged in the complaint. Rather, AJS's major purpose is to discuss issues of importance to its members at all levels of government.

Finally, since this television communication does not reference a federal candidate, it does not violate the ban on the use of corporation funds to sponsor electioneering communications under 2 U.S.C. § 441b(b)(2).

**Complaint Communication # 27**

**Script:** Narrator No 1: "This is the Texas legislative update. State Representative Tommy Merritt announced his support for expanding the state sales tax to cover nearly all services including manufacturing, agricultural products, like timber, and even funeral services. It would also tax hair dressers, dry cleaners and even auto repairs. Now back to the music."

**Narrator No. 2:** "Higher taxes on businesses like that will only mean fewer jobs."

**Narrator No. 3:** "Maybe it's a good thing that Merritt only passed eight bills in eight years and hasn't earned any kind of leadership role in the legislature. I mean, we don't need more taxes. It does make me feel good that the only thing that is keeping us from higher taxes and fewer jobs is the fact that Tommy Merritt can't get anything done."

**Narrator No 4:** "Call Tommy Merritt at 903-238-9100 and tell him to stop wasting his time trying to raise our taxes. Paid for by Americans for Job Security."

**Analysis:** This script deals only with state issues and no one referenced in the communication was a federal candidate at the time it was distributed. Therefore, the Commission does not have jurisdiction over this communication. This communication demonstrates that AJS's major purpose is not federal campaign activity as alleged in the complaint. Rather, AJS's major purpose is to discuss issues of importance to its members at all levels of government.

Finally, since this television communication does not reference a federal candidate, it does not violate the ban on the use of corporation funds to sponsor electioneering communications under 2 U.S.C. § 441b(b)(2).

**Complaint Communication # 28**

**Script: Narrator: "The recent tax cuts have given me the help I need to raise salaries and hire additional folks. Bob Casey wants to take those tax cuts away. That'll hurt. If Casey raises taxes on small businesses, it'll hurt the little guy like me, and the people I employ, making it harder for me to hire more help, and pay my guys more. It makes no sense. Bob Casey needs to do better for small businesses in Pennsylvania. We need a strong economy, not higher taxes."**

**Screen: Call Bob Casey (718) 787-2465. Tell him higher taxes kill jobs.**

**Analysis: As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a). See Buckley, 424 U.S. at 44 n. 52.**

**Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to small business and employment issues. (See Exhibit 24; AJS 000820-000863). The issue of tax relief for small business owners is a significant issue for the business community. As State Treasurer, Bob Casey was in a position to affect these issues. The communication specifically requests that the viewer contact State Treasurer Casey to discuss these issues. See MUR 5634 OGC Report # 2 at 16. Moreover, the communication may be interpreted as request to contact State Treasurer Casey to inquire about his positions on these issues. See *id.* at 17. Importantly, the communication does not refer to State Treasurer Casey as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate. See 72 Fed. Reg. 5604. In addition, the Complaint alleges that the communication aired on July 10, 2006, almost four months before the federal general election. Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b).**

Finally, this television communication was not broadcast within thirty days of a primary election or sixty days of a general election. Therefore, it does not violate the ban on the use of corporation funds to sponsor electioneering communications under 2 U.S.C. § 441b(b)(2).

**Complaint Communication # 29**

**Script:** Narrator "Doing a good job requires dedication. Yet, as treasurer, Bob Casey has skipped work more than 43 percent of the time. In fact, just three months after being sworn in as treasurer, Bob Casey was already skipping work to look for another job. If you missed that much work, would you keep your job? Call Bob Casey and tell him we expect an honest day's work for a honest day's pay."

**Screen:** Call Bob Casey (718) 787-2465. Honest Day's Work. Honest Day's Pay

**Analysis:** As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a). See Buckley, 424 U.S. at 44 n. 52.

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to employment and government ethics issues. See Exhibit XX (AJS 000864-000871). The communication specifically requests that the viewer contact State Treasurer Casey to discuss these issues. See MUR 5634 OGC Report # 2 at 16. Importantly, the communication does not reference an election, or exhort the public to campaign for or contribute to a federal candidate. See 72 Fed. Reg. 5604. While the communication does state the fact that State Treasurer Casey skipped work more than 43 percent of the time, the plain language and video of the communication does not refer to him as a candidate. The wasting of taxpayer funds to subsidize an individual who is pursuing activities unrelated to his current job is a serious issue for the business community – an issue that State Treasurer Casey was in a position to effect. In addition, the Complaint alleges that the communication aired on June 1, 2006, almost five months before the federal general election. Accordingly, the communication does not contain an

electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b)

Finally, this television communication was not broadcast within thirty days of a primary election or sixty days of a general election. Therefore, it does not violate the ban on the use of corporation funds to sponsor electioneering communications under 2 U.S.C. § 441b(b)(2)

**Complaint Communication # 30**

Script: Narrator: "These are serious times that call for serious leaders. Yet, as treasurer, Bob Casey has skipped work more than 43 percent of the time. In fact, just three months after being sworn in as treasurer, Bob Casey was already skipping work to look for another job. With a record like that can we really count on Bob Casey to be there for us when it matters the most? Call Bob Casey. Tell him we need serious leaders in these serious times."

Screen: Call Bob Casey (717) 787-2465.

Analysis: As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a). See Buckley, 424 U.S. at 44 n. 52.

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to employment and government ethics issues (See Exhibit 26; AJS 000872-000879.) The communication specifically requests that the viewer contact State Treasurer Casey to discuss these issues. See MUR 5634 OGC Report # 2 at 16. Moreover, the communication may be interpreted as request to contact State Treasurer Casey to inquire about his positions on these issues. See *id.* at 17. Importantly, the communication does not reference an election, or exhort the public to campaign for or contribute to a federal candidate. See 72 Fed. Reg. 5604. While the communication does state the fact that State Treasurer Casey skipped work more than 43 percent of the time, the plain language and video of the communication does not refer to him as a candidate. The wasting of taxpayer funds to subsidize an individual who is pursuing activities unrelated to his current job is a serious issue for the business community – an

issue that State Treasurer Casey was in a position to effect. In addition, the complaint alleges that the communication aired on April 4, 2006, almost seven months before the federal general election. Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b).

Finally, this television communication was not broadcast within thirty days of a primary election or sixty days of a general election. Therefore, it does not violate the ban on the use of corporation funds to sponsor electioneering communications under 2 U.S.C. § 441b(b)(2)

#### Complaint Communication # 31

Script: Narrator "These days Edgar's afternoons are reserved for grandkids. Like thousands of Pennsylvania seniors, he's enjoying retirement, because Rick Santorum is protecting his Social Security. Santorum sponsored legislation guaranteeing Americans 55 and over the Social Security they deserve, fighting to make sure Congress can't touch it in the future. Because seniors worked so hard to pay into it Santorum's ensuring it's there when they need it. Call and say 'thanks.' Rick Santorum's the one getting it done."

Screen: Senator Rick Santorum (717) 231-7540 Getting it done.

Analysis: As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a). See Buckley, 424 U.S. at 44 n. 52

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to social security issues. (See Exhibit 27; AJS 000880-000956.) On September 22, 2005, Senator Santorum introduced S. 1750, a bill to guarantee social security benefits to beneficiaries born before 1950. The communication specifically requests that the viewer contact Senator Santorum to discuss these issues. See MUR 5634 OGC Report # 2 at 16. Moreover, the communication may be interpreted as request to contact Senator Santorum to inquire about his positions on these issues. See id. at 17. Importantly, the communication does not refer to Senator Santorum as a candidate, reference an election, or exhort the public to campaign for

or contribute to a federal candidate See 72 Fed. Reg. 5604 In addition, the complaint alleges that the communication aired on November 29, 2005, almost one year before the federal general election Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100.22(b).

Finally, this television communication was not broadcast within thirty days of a primary election or sixty days of a general election. Therefore, it does not violate the ban on the use of corporation funds to sponsor electioneering communications under 2 U.S.C. § 441b(b)(2).

#### Complaint Communication # 32

Script: Narrator: "Most Saturdays they get together in the park, 8 a.m. sharp. Pennsylvania families relax a little more these days because Rick Santorum is getting things done every day. Over \$300 billion in tax relief. Eliminating the marriage penalty. Increasing the per child tax credit. All done And now Rick Santorum's fighting to eliminate unfair taxes on family businesses Call and say thanks, because Rick Santorum is the one getting it done "

Screen: Senator Rick Santorum (717) 231-7540

Analysis: As can be seen, this communication does not contain any terms that expressly advocate the election or defeat of any clearly identified federal candidate, and, therefore, does not constitute express advocacy under 11 C.F.R. § 100.22(a) See Buckley, 424 U.S. at 44 n. 52

Also, this communication does not constitute express advocacy under 11 C.F.R. § 100.22(b). The issues discussed in this advertisement pertain to tax policy. (See Exhibit 28; AJS 000957-000992.) The President's 2003 tax relief package was an issue considered and debated by the 109<sup>th</sup> Congress. Senator Santorum voted for the original 2003 and was a co-sponsor of S.7, a bill introduced in the 109<sup>th</sup> Congress, to make the tax reductions permanent The communication specifically requests that the viewer contact Senator Santorum to discuss these issues. See MUR 5634 OGC Report # 2 at 16 Moreover, the communication may be interpreted as a request to contact Senator Santorum to inquire about his positions on these issues. See id. at 17 Importantly,

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the communication does not refer to Senator Santorum as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate. See 72 Fed. Reg. 5604 In addition, the complaint alleges that the communication aired on November 15, 2005, almost one year before the federal general election. Accordingly, the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and does not constitute express advocacy under 11 C.F.R. § 100 22(b).

Finally, this television communication was not broadcast within thirty days of a primary election or sixty days of a general election. Therefore, it does not violate the ban on the use of corporation funds to sponsor electioneering communications under 2 U.S.C. § 441b(b)(2)

**B**     The Complaint does not allege nor cite any evidence that any AJS solicitations resulted in contributions to the organization under 11 C.F.R. § 100.57 or FEC v. Survival Education Fund, Inc.

Under current Commission regulations, funds received by an organization are considered contributions if they are in response to a communication that indicates that "any portion of the funds received will be used to support or oppose the election of a clearly identified federal candidate " 11 C.F.R. § 100 57. This regulation did not become effective until January 1, 2005.

The E&J for section 100.57 contains examples of requests for funds that result in contributions and those that do not. See 69 Fed. Reg. 68057 (2004). The Commission uses the following example for a solicitation that does not result in a contribution "The President wants to cut taxes again. Our group has been fighting for lower taxes since 1960, and we will fight for the President's tax cuts. Send us money for our important work." Id. On the other hand, the Commission posited that this solicitation would result in a contribution. "The President wants to cut taxes again. Our group has been fighting for lower taxes since 1960, and we will fight to give the President four more years to fight for lower taxes. Send us money for our important work." Id. (emphasis added).

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According to the Commission's E&J, if a request for financial support references a clearly identified candidate, the focus then turns to the text of the communication 69 Fed. Reg. 68057 (2004). "The regulation turns on the plain meaning of the words used in the communication and does not encompass implied meanings or understandings" *Id.* (emphasis added). Accordingly, the regulation requires the plain text of the request for funds to contain phrases such as "Electing Joe Smith," "[t]he congressman needs our help to stay in Washington," and "make sure Californians remember in November." *Id.* Any words or phrases that do not have similar meanings will not result in contributions under the regulation.

For pre-2005 requests for funds, the Commission has erroneously relied upon FEC v. Survival Education Fund, Inc. to reach the same conclusion; namely, that a communication that indicates that a portion of the funds received will be used to support or oppose the election of a clearly identified federal candidate results in a contribution *Id.* at 295. However, the SEF opinion clearly states that "issue-advocacy groups may take positions favorable or unfavorable to different candidates, and may solicit contributions to promulgate their views to the public, even if for the express purposes of applauding or criticizing candidates during an election campaign." *Id.* Thus, the plain text of the opinion indicates that express advocacy is required, either for the communication itself, or for the solicitation for a communication.<sup>12</sup>

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<sup>12</sup> Although SEF is not a frequently cited case, a few subsequent decisions emphasize that the proper reading of SEF is that federal funds are required only where express advocacy is clearly indicated. In FEC v. Public Citizen, the Eleventh Circuit upheld the constitutionality of the disclosure requirement in §441d(a) – the same provision challenged in SEF – by holding that "the statute's reach is limited to those communications which expressly advocate the election or defeat of a clearly identified federal candidate" 268 F.3d 1283, 1284 (11th Cir. 2001). The court found that limiting the disclosure requirement to communications containing express advocacy was sufficiently narrowly tailored to advance the government interest while minimally burdening expression. *Id.* at 1289-90. See also Vermont Right to Life v. Sorrell, 19 F. Supp. 2d 204, 215 (D. Vt. 1998) (holding, in review of a state disclosure requirement, that "[t]o avoid constitutional overbreadth, 'expenditure' as used in Section 2883 must be construed 'to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate'" (quoting Buckley, 424 U.S. at 80)).

In 2004, the Sixth Circuit reaffirmed the importance of the "express advocacy" requirement, even in the wake of McConnell. In Anderson v. Speer, the court upheld a Kentucky regulation which prohibited "electroneering" within 500 feet of a polling place, but only after applying a narrowing construction. 356 F.3d 651, 665 (6th Cir. 2004). The court found that the state's definition of "electroneering" was impermissibly broad, and upheld the statute, so long as it

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Commission precedents also support this reading of SEF. In 2003, the OGC sought to extend SEF in a similar manner. In response to an Advisory Opinion request from Americans for a Better Country ("ABC"), the initial draft of the Advisory Opinion circulated by the OGC cited SEF for the proposition that "[i]f ABC solicits funds using the names of specific Federal candidates in a manner that will convey ABC's support for or opposition to specific Federal candidates, the funds raised will be contributions to ABC subject to the Act's contribution limits and source prohibitions." Lawrence H. Norton, et al., original draft AO 2003-37 at 29 (January 29, 2004), <http://www.fec.gov/aos/2003AOs.shtml> (last visited July 18, 2006). In the citation sentence to SEF, the draft also stated that "solicitations for funds, styled as contributions, for an incorporated issue advocacy group are subject to regulation under the Act." *Id.*

In the final Advisory Opinion responding to ABC, the Commission abandoned this contention. The AO as approved by the Commission does not cite SEF at all, and confines its analysis to the activities of declared political committees. FEC AO 2003-37 (February 19, 2004) <http://ao.nictusa.com/ao/no/030037.html>. In fact, a review of all of the advisory opinions available on the FEC website shows just one citation to SEF, and it is for the following proposition: "Lower federal courts and state courts have also consistently struck down efforts to regulate speech that do not include explicit words of advocacy of the election or defeat of clearly identified candidates." FEC AO 2000-16 at n 9 (August 28, 2000) <http://ao.nictusa.com/ao/no/200016.html>. This earlier citation to SEF represents an accurate reading of the case, and also the antithesis of the reading which the Commission attempts to advance in political committee status enforcement matters.

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"app[ly] only to speech which expressly advocates the election or defeat of a clearly identified candidate or ballot measure." *Id.* The court observed that the distinction between express and issue advocacy was "necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant government interest." *Id.* at 664-65. This recent case demonstrates that the distinction between express and issue advocacy can be sustained in the post-McConnell era.

Accordingly, Public Citizen does not allege and the Complaint does not cite any evidence that AJS received any contributions as a result of its financial correspondence with its members or potential members. There is no factual or legal basis for finding reason to believe that AJS has satisfied the contribution path to political committee status.

C. AJS's major purpose is to advance the common business interests of its members by publicizing pro-business and economic expansion public policy issues, not federal election activity.

AJS is a 501(c)(6) entity and not a political organization. As stated in its articles of incorporation, AJS is an incorporated trade association organized pursuant to section 501(c)(6) of the Internal Revenue Code for the purpose of uniting "in a common organization businesses, business leaders, entrepreneurs, and associations of businesses" and to "promote the common business interests of its members . . . by helping the American public to better understand public policy issues of interest to business." (Duble Aff., Ex. A.) the IRS audited AJS in 2004, and elected to take no further action challenging its status under IRC § 501(c)(6). (Duble Aff. ¶ 5.) AJS continues to maintain its tax exempt status as a nonprofit trade association in good standing. *Id.*

Contrary to the unfounded allegations in the Complaint, AJS's major purpose is not "promoting the election or defeat of candidates for federal office." PCFEC at 3. AJS's message is focused on educating the public on policy positions and encouraging the public to urge legislators – or other government officials – to support policies consistent with AJS's pro-job, pro-growth agenda. Such educational efforts and other "grassroots lobbying" are standard fare for trade associations such as AJS. See PC Comment at 6-7 ("In particular, a legitimate 501(c) organization should not have to fear that it will become a political committee simply by engaging in political issue-related criticisms of public officials."). The Commission should not mischaracterize AJS's legitimate issue-advocacy as expenditures through a process of after-the-fact "bootstrapping." See *id.*

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In 2004 and 2005, for example, AJS sponsored a widespread campaign concerning legislation to repeal the death tax. It distributed a series of print advertisements in Oklahoma criticizing then-Senator Don Nickles – a Republican not running for re-election – for not doing more to repeal the death tax. AJS continued this campaign in 2005 with a series of broadcast communications urging listeners to contact key Democratic Senators to ask for their support to repeal the death tax. Also that year, AJS produced a series of print advertisements that criticized Senate leadership – specifically, then-Majority Leader Frist, Senator Jon Kyl, and Senator Santorum – for failing to bring the death tax repeal legislation to the floor for a vote, despite their public promises to repeal the death tax.

The 2004-2005 death tax campaign resoundingly rebuts the suggestion that AJS is an electoral, rather than issue-oriented, entity. The 2004 communications focused on a retiring Senator, and the 2005 communications name a Senator (Frist) who had already announced his intent not to seek re-election and several others (Pryor, Bayh, Landrieu, Baucus, and Wyden) who were not in an election cycle at the time.

In addition, AJS sponsored a series of television communications concerning the legislation to establish the asbestos trust fund in early 2006. The purpose of the advertisements was to generate opposition to the asbestos trust fund legislation that was being considered by the United States Senate. The communications criticized the policy positions of Republican Senators supporting the legislation, and praised the policy positions of Democratic Senators opposing the legislation. (Dubke MUR 5910 Aff. ¶ 6.) Part of this effort involved communications that were distributed in the following states criticizing the asbestos trust fund policy positions of the following Republican Senators: Alabama (Sen. Sessions), Arizona (Sen. Kyl), Idaho (Sens. Craig and Crapo), Kentucky (Sens. Bunning and McConnell), Mississippi (Sen. Lou), Montana (Sen. Burns), New Hampshire (Sens. Gregg and Sununu), Oklahoma (Sen. Coburn), South Dakota (Sen. Thune), Utah

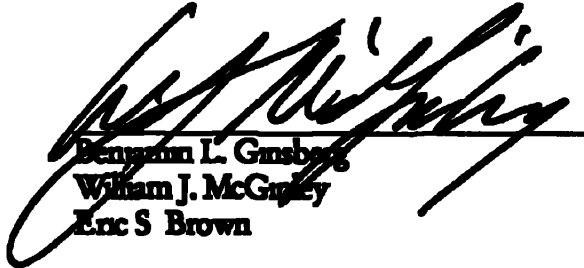
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(Sens. Bennett and Hatch), and Wyoming (Sens. Enzi and Thomas) (Id. ¶7.) The advertisements that were distributed in North Dakota, on the other hand, praised the public policy positions of Senators Kent Conrad and Byron Dorgan for opposing the asbestos trust legislation and fighting for small businesses and the jobs they create (Id. ¶8.) The complaint ignores these issue-advocacy communications in an effort to mischaracterize AJS's activities and purposes.

### III. CONCLUSION.

As explained fully above, there is no factual or legal basis to the allegations contained in the Complaint. Accordingly, AJS respectfully requests that the OGC recommend, and the Commission find, that there is no reason to believe that a violation of the Act was committed in this matter, dismiss the Complaint, and take no further action.

Respectfully submitted,



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